



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.12.2017

CORAM :

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THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.No.1379 of 2012

Employee State Insurance Corporation,
Deputy Regional Office,
Municipality Shopping Complex, Salai Street
Sindupoonthurai, Tirunelveli
Represented by its Joint Director.

... Appellant

Vs.

Tamilnadu Jaibharathi Mills Ltd.,
Malayan Kulam Village,
Chidambrapuram-627754
Sankarankoil Taluk,
Represented by its Senior Manager Factory

... Respondent

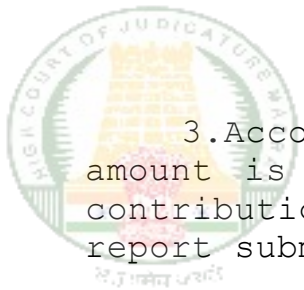
Prayer: Civil Miscellaneous Appeal is filed under Section 82(2) of the Employees State Insurance Act, 1948, to set aside the order dated 21.08.2012 passed in ESIOP No.9 of 2012 by the Labour Court, Tirunelveli.

For Petitioner	: Mr.R.Ravindran
For Respondent	: Mr.K.Hemakarathikeyan

ORDER

This Appeal has been filed by the Appellant against the order dated 21.08.2012 passed in ESIOP No.9 of 2012 by the Labour Court, Tirunelveli.

2.The Appellant corporation made a demand of Rs. 2,36,550/- against the Respondent on 26.01.2012 towards penalty for non payment of the contribution on time. The demand was made under section 85-B of the Employees State Insurance Act, 1948. The said demand is challenged by the Respondent before the Labour Court. The Labour Court quashed the impugned demand, against which the corporation has now filed this instant Appeal. According to the learned counsel for the Appellant, the contribution for the years 2006 and 2007 was paid by the Respondent only in the year 2011. Therefore the Respondent is liable to pay penalty as per Section 85-B of the ESI Act 1948.



3. According to the learned counsel for the Respondent, no amount is payable by the Respondent to the Appellant since the contribution was paid within 21 days from date of the inspection report submitted by the Appellant.

4. The learned counsel for the Respondent submits that the Respondent company is a Sick Company and has been referred to the B.I.F.R. According to the learned counsel this fact has been recorded in the finding of the labour Court. The learned counsel submits that under section 85-B of the Employee State Insurance Act, 1948, there is a proviso which enables the Appellant to waive the penalty in case the Company has become sick and referred to the BIFR. Further according to the learned counsel, the entire arrears of contribution was paid by the Respondent within 21 days from the date of submission of the inspection report by the Appellant.

5. The Learned counsel for the Respondent also relied upon a judgment of the Hon'ble Supreme Court reported in **(2008) 3 Supreme Court Cases 35, Employees' State Insurance Corporation Vs. HMT LTD and others**. He referred to Paragraphs No.21,24,25,26 of the said judgment which is reproduced below:

"21. A penal Provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.

24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principle legislative provisions.

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinary, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the



principles of natural justice is necessary thereunder.

26. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and / or the quantum thereof."

6. Relying upon the the judgment referred to supra, the Learned counsel for the Respondent submitted that there is no mens rea or actus reus on the part of the respondent to contravene the statutory provision which is a necessary ingredient to levy damages. According to the Learned counsel for the Respondent, only because of its sickness, the Respondent was unable to pay the contribution on time.

7. The learned counsel for the Respondent drew the attention of this Court to the findings of the Labour Court and submitted that there is a clear finding that the Respondent is not liable to pay penalty in view of the aforesaid reasons.

8. Section 58-B Employees State Insurance Act, 1948 reads as follows.

"(1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover ⁷⁹[from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations]:

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard:

⁸⁰[Provided further that the Corporation may reduce or waive the damage recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations.]

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue ⁸⁰[or under section 45-C to section 45-I]"

9. The fact that the Respondent company is a sick company and has been referred to the B.I.F.R is not disputed by the Appellant. The Appellant has also not disputed the statement of the



Respondent that the entire arrears of contribution was paid within 21 days from the date of submission of the inspection report. There is also no mens rea or actus reus to contravene the statutory provision by the Respondent. As seen from section 85-B, the Appellant has got the powers to waive the penalty in the event of the company becoming sick and has been referred to the B.I.F.R. This Court having perused the award passed by the labour Court is of the considered view that the labour Court has rightly quashed the impugned demand of the Appellant. Therefore, there is no merit in the Appeal filed by the Appellant against the order of the Labour Court.

10. In the result, the Appeal is dismissed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(w)

/True Copy/

Sub Assistant Registrar

+1cc to Mr.R.Ravindran, Advocate Sr.No.92799

+1cc to Mr.K.Hemakarthikeyan, Advocate Sr.No.92702

SMI

VB/JC/SAR3/17/01/2018/4P/3C

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